

Prospect Lefferts Garden Neighborhood Association, Inc., Association of Neighborhood Housing Developers, Inc. and Local 1205, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29-CA-8321

30 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS

On 6 May 1983 Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, and New York, New York, on 8 days between July 15 and 26, 1982. The complaint alleges that Prospect Lefferts Garden Neighborhood Association, Inc. (PLGNA), and Association of Neighborhood Housing Developers, Inc. (ANHD), are joint employers of the employees of PLGNA and that Respondents interrogated their employees, threatened their employees, and discharged employee Luis Colon on September 17, 1980, in violation of Section 8(a)(1) and (3) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by Respondents in October 1982, I make the following

FINDINGS OF FACT

1. JURISDICTION

The General Counsel asserts that ANHD and PLGNA, both nonprofit corporations organized for the purpose of assisting community housing organizations and tenants in low income areas of New York City, are joint employers and that their operating funds consist of over \$1 million derived from CETA and Housing and Urban Development funds. The General Counsel asserts that ANHD and PLGNA have cooperated directly concerning funding and budget proposals, and labor relations and in negotiating the CETA contract proposal. In addition, the General Counsel urges that the evidence shows that ANHD played a "crucial role" in hiring PLGNA employees in that it recommended and referred employees to PLGNA for specific positions and approved the hiring.¹ The General Counsel contends that an ANHD monitor oversaw the duties and assignments of CETA employees at PLGNA and tried to resolve problems between CETA employees and PLGNA management in imposing disciplinary action. Further, ANHD issued checks to PLGNA employees. In support of his position on jurisdiction, the General Counsel cites *Marysville Travel Lodge*, 233 NLRB 527 (1977); *Community Services Planning Council*, 243 NLRB 798 (1979); *Evergreen Legal Services*, 246 NLRB 964 (1979); *Montgomery County Opportunity Board*, 249 NLRB 880 (1980); and *New York Institute for the Education of the Blind*, 245 NLRB 664 (1981).

PLGNA and ANHD deny that they are joint employers and deny that the Board has jurisdiction over Respondents. Respondents also deny the other material allegations of the complaint.

A review of the record reveals that the relationship between PLGNA and ANHD arises from two very distinct circumstances.² The first is PLGNA's membership in ANHD. The second is ANHD's role as a contractor and PLGNA's role as subcontractor under the Federal CETA VI program for which the city of New York was the prime sponsor.

I will discuss first PLGNA's membership in ANHD. ANHD is a nonprofit corporation providing advocacy, leadership, and technical assistance to other nonprofit groups interested in housing issues. ANHD is organized as a voluntary membership association of 25 of these

¹ The General Counsel states that of eight or nine employees at PLGNA, four or five were hired pursuant to the CETA contract.

² I have credited the testimony of Bonnie Brower, executive director of ANHD since November 1981; Donna Dougherty, a housing specialists with PLGNA; Myles Fink, a former assistant project coordinator of ANHD; Ann McNamara, general counsel of the New York City Department of Employment; and Gary S. Hattem, executive director of the St. Nicholas Neighborhood Preservation Corporation. Gwendolyn Moody, former executive director of PLGNA also testified, in part, concerning jurisdictional facts; although her recollection was not as good as that of the other witnesses, I will credit it as to jurisdictional matters where it is generally consonant with the testimony of other witnesses. Luis Colon testified, in part, relating to jurisdictional matters. His testimony was shifting, self-contradictory, and inconsistent. Further, he admitted that he falsified certain matters on his CETA employment application. Colon was not a reliable witness and I do not credit his testimony.

nonprofit groups, including PLGNA.³ ANHD policies are determined by its 15-person board of directors; at the time relevant to the instant case, 9 of the members of the Board were representatives of ANHD's member groups such as PLGNA. ANHD is operated by an executive director and staff. The function of ANHD is to develop programs and advocacy on behalf of low income housing groups in the city of New York.⁴ Among its various activities ANHD offers workshops and seminars in technical skills to tenants in low income areas. Subjects dealt with include financing possibilities and tenant training for cooperative ownership. ANHD maintains a hotline to provide information to housing groups and individuals tenants. ANHD attempts to spur public discussion of issues relating to low income housing properties subject to tax foreclosure by the city of New York. ANHD operates a health insurance consortium that is open to employees of members groups as well as employees of non-member groups on the payment of insurance premiums. From time to time, ANHD staff may help an individual member group to edit and refine a grant application, but ANHD does not help develop grant proposals nor assist member groups in negotiations with prospective grantors. At various times, ANHD has submitted grant proposals to raise money for itself and its members groups jointly. The funds received in this matter were unrestricted, and ANHD exercised no control or audit over their use by the individual member groups.

ANHD adopted a personnel plan policies and procedures on July 25, 1979, for its own employees only. It maintains no grievance mechanism for employees of member groups. ANHD does not participate in labor relations or negotiations on behalf of its member groups. It does not screen, hire, or fire employees of its members. It has played no role in setting terms and conditions of employment for employees of its member groups and it does not train the staff of its member groups. There is no interchange of employees between ANHD and its member groups and no right to transfer seniority or benefits for an employee who leaves the employ of a member group to work for ANHD.⁵ ANHD receives no logs or reports accounting for the work of employees of its member groups.

In fiscal years 1980-1981, ANHD received \$154,190 in funding from private foundations and an additional \$121,000 for distribution to its member groups from such foundations. In these 2 years, approximately \$5000 of this sum was distributed to PLGNA pursuant to joint fund raising.

PLGNA is governed by a 15-member board of directors which has adopted corporate bylaws and personnel policies and procedures applicable to PLGNA employees. The purposes of PLGNA as stated in the certificate of incorporation are to unite property owners and tenant

and community organizations in order to encourage civic improvement, combat community deterioration, lessen neighborhood tensions, and advise the public about subjects beneficial to the community. PLGNA operates in a defined "neighborhood" consisting of less than one-half square mile in the Bedford-Stuyvesant area of Brooklyn where its major activities consist of organizing tenants to assert their rights and providing tenants with practical and technical information. At the time relevant to the instant proceeding, PLGNA had an annual budget of about \$93,000;⁶ it employed about 9 or 10 employees including a full-time executive director, two VISTA volunteers,⁷ three CETA participants, a New York housing consultant, one or two youth program employees, and a part-time coordinator of summer youth programs funded by the city of New York. In the calendar year 1980, PLGNA purchased insurance, supplies, and printing services exclusively in the city of New York in the amount of \$1769. In addition, it purchased \$83 worth of pens from a firm in California.

The General Counsel does not contend that PLGNA alone fails under the jurisdiction of the Board.

We now turn to ANHD's relationship to PLGNA with respect to the CETA program.

From November 1, 1979, to September 30, 1981, ANHD was a prime contractor for a \$3.5 million CETA VI contract of which the city of New York was the prime sponsor.⁸ The Department of Employment, the operating agency responsible for the CETA program on behalf of the city of New York, had determined that for reasons of efficiency it could not deal with any nonprofit agency which employed less than 50 CETA participants. As a result, the department sought out 66 nonprofit "umbrella" agencies to act as prima contractors and submit proposals covering a stated number of employees to be paid by CETA funds. ANHD was one such umbrella agency. The contract between ANHD and the department provide for CETA positions at some 39 subcontractors, including PLGNA.⁹ The contract between the Department of Employment and ANHD contained a description of a fixed number of employee positions under CETA as well as narratives concerning the projects to be completed by each of the subcontractors. The department approved the narratives for each subcontractor after these were developed by the subcontractors in light of their particular objectives and were submitted by ANHD. The individual subcontractors negotiated the terms of the narratives and the number of CETA positions allocated to them according to their own political

⁶ In fiscal year 1980, \$19,000 of this sum was obtained by fund raising, \$15,000 was from a summer youth employment program, \$29,000 was from a New York State grant, \$6500 was obtained from a New York City grant, and \$23,000 represented CETA payments to be described below.

⁷ These employees were community organizers in the Volunteers in Service to America program. They were paid by a VISTA and subject to VISTA personnel policies and procedures. They had no contract with ANHD in connection with their hiring or tenure.

⁸ CETA VI was a public service employment program funded by the Federal Government.

⁹ Some of the other CETA subcontractors were also member groups of ANHD, but there was no requirement that subcontractors become members of ANHD.

³ At the time relevant to the instant proceeding, member groups did not pay dues to ANHD. Each member group had its own board of directors and bylaws; ANHD had no involvement in election of these other boards or adoption of their bylaws.

⁴ ANHD is governed by its bylaws, adopted in November 1980.

⁵ By coincidence, ANHD in 1982 hired an individual who had once been executive director of PLGNA, although he had held another unrelated post in intervening years.

strength in city politics. ANHD exercised no influence in these negotiations, although ANHD representatives were present at some of the negotiation sessions.

ANHD was the payroll agent for all of the subcontractors covered by the CETA contract. The subcontractors, including PLGNA, kept time and payroll records for their CETA employees. At the end of a payroll period, the payroll records were submitted to ANHD which then generated a computerized payroll for the subcontractors. Pursuant to this system, the Department of Employment, avoided dealing with each subcontractor individually; instead, the department disbursed funds only to ANHD directly.

During the 1979-1981 term of the CETA contract, PLGNA had three CETA positions for which it received a total of \$25,605 in wages and \$7030 in fringe benefits. Wage rates and other conditions of employment were set by individual subcontractors within CETA guidelines which required that CETA participants be treated equally to other subcontractors employees.¹⁰

The hiring of a CETA employee was initiated when a prospective participant was screened for eligibility by the Department of Employment. After the initial screening, the department, which maintained a computer listing of all open CETA positions in the city, sent candidates to various umbrella agencies such as ANHD for referral to and interview by the particular subcontractor with an appropriate open position. The referral form, or "green sheet," listed the candidate's name, address, and education and stated what positions he was being referred for. Each CETA participant had three referrals, and ANHD provided an office where the participant could be interviewed by the executive director of the subcontractor. In some cases, ANHD would send the participant to be interviewed at the work location.

The executive director of each subcontractor, including PLGNA, decided whether to employ a prospective CETA worker after the interview. If the decision was made to hire a CETA candidate, the executive director submitted the appropriate form to ANHD which thereupon requested the Department of Employment to perform additional CETA eligibility screening. When the screening was complete, the department would issue a starting date for the employee. ANHD had no authority to hire CETA workers for any subcontractor, and the testimony showed that no executive director of a subcontractor had ever consulted with ANHD as to the desirability of hiring a particular applicant. ANHD's role in the hiring process was limited to processing the paperwork required by the Department of Employment and arranging for interviews to take place.

Each umbrella agency, including ANHD, had a Department of Employment CETA operations manual to guide the daily operations of the CETA contract and the flow of paperwork to the department. The manual contained sections relating to definitions, policy statements, grievance and complaint procedures, hiring, technical as-

sistance, reporting requirements, and the like, ANHD's task was to interpret the manual to the individual subcontractors so as to assure that their operations conformed to Department of Employment requirements. In order to render this technical assistance to the subcontractors, ANHD sought the department's advice by telephone 20 to 25 times per day.

If a subcontractor such as PLGNA decided to discharge a CETA employee, it was required to provide him with written notice of termination setting forth the reason for the discharge and the participant's right of appeal.¹¹ ANHD was required to process the paperwork related to a discharge, but its approval was by no means required. ANHD's role was limited to assuring that the paperwork was submitted to the Department of Employment in the proper form. Executive directors of subcontractors informed ANHD what personnel actions they planned to take and ANHD advised them of the procedure for accomplishing that end. However, ANHD did not seek to enter the decision making process.¹²

The executive director of each subcontractor such as PLGNA was responsible for directing the work of all the subcontractor's employees including CETA participants. ANHD monitors visited the subcontractor's work locations to insure that the CETA contract was being implemented according to CETA regulations; the monitors checked that CETA employees were performing work described in their position descriptions and that reports were submitted on time. The ANHD monitor's role was to validate information provided by the subcontractor under Department of Employment performance measures.

It is clear that ANHD was not the joint employer of the PLGNA employees by virtue of PLGNA's membership in ANHD. It is also clear that ANHD was not the joint employer of PLGNA's non-CETA employees under any circumstances. The question remaining to be decided is whether ANHD was the joint employer of PLGNA's three CETA employees for the term of the CETA contract. I believe that this question should be answered in the negative.

In *Travelodge Corp.*, 182 NLRB 370 (1970), the Board held that a joint venture constituted a single employer under the Act where the umbrella Travelodge Corporation retained certain rights to control in a joint venture with the local Travelodge hotel. The local corporation had the right to hire employees subject to approval of

¹¹ Appeals alleging discrimination or violations of the CETA Act were made to the department and then to the United States Department of Labor. Other appeals went through a subcontractor's usual appeal procedures, to an ANHD hearing and then to the Department of Employment at the United States Department of Labor. The ANHD step resulted in a decision appealable through city of New York procedures.

¹² In the instant case, the evidence shows that Luis Colon was discharged by Gwendolyn Moody, the executive director of PLGNA. After she informed Colon that he was terminated but before he left the premises, Moody called Myles Fink at ANHD for assistance. Moody informed Fink that she had fired Colon but that he was still on the premises and threatening to create a disturbance. Fink then went to the PLGNA office where he helped Moody to draw up a formal letter of discharge that met Department of Employment requirements. Moody told Fink why she was discharging Colon and Fink helped her to cast these reasons in "bureaucrates."

¹⁰ One of the ANHD subcontractors, Pratt Institute for Community Development, had a unionized work force and entered into a collective-bargaining agreement. ANHD was not involved in the collective-bargaining negotiations in any way.

the umbrella corporation, which retained the right to inspect the hotel, assume active management for 5 days, and designate the management of the hotel in the event of a sale. A group of area representatives of all the local hotels set policies and resolved major problems for the joint venture. The Board's ruling was based on "the degree of control" reserved to the umbrella corporation had on the fact that the local hotel held itself out to the public as one of a chain of hotels. In *Marysville Travelodge*, supra, the Board asserted jurisdiction over a similar joint venture, finding that the parties constituted a single employer for jurisdictional purposes. The parties each owned 50 percent of the business and shared equally in the profits and losses. The local owners were required to comply with standards of management and housekeeping of Travelodge International. The local venture made quarterly reports to the International, and could hire employees according to standards of the International. Travelodge International had the right to make inspections and to examine and copy records of the joint venture. There were detailed regulations concerning banking practices registration records, maid work-sheets, and laundry records. Travelodge International had the right to assume management of the motel on any breach of the joint venture agreement by the local party. The local hotel was integrated into the international motel system for directory reservation, referral and advertising purposes. The operations manual extensively covered standards accounting, insurance, legal matters, personnel, purchasing, front office, housekeeping, maintenance, reservations, and credit. There was a general wage policy and a section governing benefits, holidays, and leaves. Training was specified by the manual. The section on "Union negotiations" directed the local motel to conduct any union contacts only after consultation with the legal and personnel department of corporate headquarters.

In the instant case, ANHD did not exercise the type of control over PLGNA that was described in the two cited cases. The facts in this record show that ANHD was the paymaster for CETA employees and acted as a bureaucratic conduit for paperwork between the New York City Department of Employment and individual subcontractors such as PLGNA. However, ANHD did not determine the pay practices or fringe benefits of PLGNA, it had no right to assume control of PLGNA's CETA employees nor direct their employment and it did not approve the hiring of PLGNA's CETA employees. ANHD did not determine the standards of service to be offered by PLGNA through its CETA employees. ANHD did not have the authority to set conditions of employment relating to hours, vacations, sick leave,

coffee breaks, and the like for the CETA employees of PLGNA. ANHD could not require training of CETA employees by PLGNA. Finally, the testimony shows that, in the one instance where an ANHD subcontractor's employees were represented by a union, ANHD played no role in the negotiation of the collective-bargaining contract.¹³

Contrary to the General Counsel's assertions, the evidence shows that ANHD did not negotiate the CETA contract on behalf of PLGNA, that ANHD performed only a paperwork function in hiring PLGNA employees, that it did not recommend CETA participants to PLGNA for hiring and that ANHD did not oversee the work of CETA participants at PLGNA.

I do not find it significant that some appeals from subcontractor disciplinary actions were hired by an ANHD employee. The hearing was but one step in a lengthy appeal procedure which went on to the city of New York and the United States Department of Labor, and it cannot be viewed as dispositive in this proceeding.

The General Counsel based his assertion the PLGNA is subject to the jurisdiction of the Act on the allegation that PLGNA and ANHD were joint employers of PLGNA's CETA employees. Since I have found that there was no joint employer relationship, I must also find that PLGNA is not subject to the jurisdiction of the Act.

CONCLUSIONS OF LAW

PLGNA is not an employer engaged in commerce within the meaning of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation¹⁴

ORDER

The complaint is dismissed in its entirety.

¹³ The other cases cited by the General Counsel are not persuasive. In *Community Services Planning Council*, supra, the executive director of the umbrella organization "has direct oversight over the operation of both organizations, including their labor relations." 243 NLRB at 799. In *Montgomery County Opportunity Board*, supra, the Board found, in a case similar to the instant case, that the employer, within existing guidelines of an umbrella agency, "is free to hire, to discharge, to transfer and to promote unit employees and to determine generally, subject only to broad limitations, applicable day-to-day working conditions, including wages." 249 NLRB at 881. In *New York Institute for the Education of the Blind*, supra, the Board found that the employer was an administration arm of the State.

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.